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No. 93-778

In The

Supreme Court of the United States

October Term, 1993

BP NORTH AMERICA PETROLEUM, INC.,

Petitioner,

versus

THE ROBERT E. LEE SS, her engines, tackles, apparel and furniture, *in rem;*

and

WATERMAN STEAMSHIP CORPORATION, INTERNATIONAL SHIPHOLDING CORPORATION, and MIDLAND ENTERPRISES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the real issues for review are as follows:

1. Should the Supreme Court grant a Writ of Certiorari to review the Court of Appeals' conclusion that BP NAP lacked the requisite "proprietary interest" in the IMTT-Gretna facility to assert a claim for recovery of economic loss where BP NAP did not own, operate, mannor maintain the damaged facility and BP NAP merely contracted with IMTT-Gretna for the use of certain storage tanks and was afforded a dedicated pipeline and preferential berth at the dock?

2. Whether the rule of *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) and *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986), preclude recovery of damages for interference with contractual rights arising out of a collision between an oceangoing merchant vessel and a dock facility on a navigable waterway of the United States to the exclusion of any state law remedies?

3. Whether the Court of Appeals correctly exercised jurisdiction to decide plaintiff's state law claims where maritime jurisdiction, 28 U.S.C. § 1333 was uncontested and the claim arose out of a single incident – the collision of the S/S ROBERT E. LEE with a barge moored on the Mississippi River – on navigable waters in the United States?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The Court of Appeals Decision is Consistent With This Court's Pronouncement in *Robins Drydock* And Its Progeny 9

II. Federal Admiralty Law Controls Disposition of Case to the Exclusion of State Law Remedies 18

III. Court of Appeals Had Jurisdiction Under 28 U.S.C. 1333 to Adjudicate Entire Controversy Including State Law Claim 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 2d 280 (1973) 20, 21

Benefiel v. Exxon Corp., 959 F.2d 805 (9th Cir. 1992) 17

Carnegie v. Mellon University v. Cohill, 484 U.S. 343, 1085 S.Ct. 614, 98 L.Ed. 2d 720 (1988) 21

Dick Meyers Towing Services, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978), cert. den. 440 U.S. 908, 99 S.Ct. 1215 (1979) 6, 10, 12

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972) 9

Foremost Insurance Co. v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982) 9

Freeport Sulphur Co. v. S/S HERMOSA, 526 F.2d 300 (5th Cir. 1976) 9, 18

Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY, 614 F.Supp. 890 (E.D. PA 1985) 14

In Re: Bethlehem Steel Corp. v. Marriott Corp., 631 F.2d 441 (6th Cir. 1980) 17

Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961) 9, 18

Louisiana ex rel Guste v. M/V TESTBANK, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986) ..... *passim*

Louisville & Nashville Railroad v. M/V BAYOU LACOMBE, 597 F.2d 469 (5th Cir. 1979) 10, 12, 13, 14, 20

TABLE OF AUTHORITIES - Continued

Page

Mathiesen v. M/V OBLIX, 817 F.2d 345 (5th Cir.), cert. den. 484 U.S. 898, 108 S.Ct. 234 (1987) 8, 10, 12

Naviera Maersk Expana v. Cho-Me Towing, Inc., 782 FSupp. 317 (E.D. LA 1992) 10

Palumbo v. Boston Towboat Co., Inc., 487 N.E. 2d 546 (Mass. App. Ct. 1986) 20

Petitions of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) 17

Robins Drydock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 209 (1927) ..... *passim*

Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed. 2d 292 (1990) 9

T.N.T. Marine Service v. Weaver Shipyard & Dry Docks, Inc., 702 F.2d 585 (5th Cir.), cert. den. 464 U.S. 847, 104 S.Ct. 151 (1983) 8, 18

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966) 21, 22

Venore Transport Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978) 16

Vicksburg Towing Co. v. Mississippi Marine Transportation Co., 609 F.2d 176 (5th Cir. 1980) 10, 14

STATUTES & TREATISES

28 U.S.C. § 1333 21

Admiralty Extension Act, 46 U.S.C. § 740 (1975). 13, 20

Senate Report No. 1593, 80th Congress, 2nd Section 20

TABLE OF AUTHORITIES - Continued

Page

7(A) *Moore's Federal Practice & Procedure*, 3580-3581 (1983) 20

Federal Water Quality Improvement Act of 1970, 33 U.S.C. § 1161(o) (1970) 21

Practice Commentary, by David D. Siegel, 28 U.S.C.A. § 1367 at p. 240 (1993) 21, 22

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the District Court and Fifth Circuit Court of Appeals are contained in Petitioner's Appendix to its Petition for a Writ of Certiorari. All references by Respondents in this opposition brief will be to those contained in Petitioner's Appendix.

INTRODUCTION

Petitioner's brief incorporates virtually the same arguments unsuccessfully advanced by BP North America Petroleum, Inc. ("BP NAP") in the district court in September of 1992 (Appendix D at A-13), in the Fifth Circuit Court of Appeals (see Decision rendered June 25, 1993, affirming the District Court's findings and conclusions in all respects, Appendix A at A-3), on Petition for Rehearing before the Fifth Circuit, which was denied on August 16, 1993 (see Appendix B at A-7) and finally on BP NAP's Partial Motion to Dismiss filed at the appellate level and which was rejected by the Fifth Circuit on August 16, 1993 (see Appendix C at A-9). Since the arguments advanced by BP NAP in its Petition have been exhaustively considered and rejected on three separate occasions by the United States Fifth Circuit Court of Appeals, Respondents, Waterman Steamship Corporation ("Waterman") and International Shipholding Corporation ("International") submit that no worthwhile purpose would be served by responding in detail to BP NAP's lengthy Petition. The flaws in BP NAP's Petition are

obvious. Nevertheless, since BP NAP's petition is misleading, both factually and legally, Respondents respectfully respond to those contentions which are legally erroneous and lack evidentiary support in the record.

STATEMENT OF THE CASE

On January 24, 1991, the S/S ROBERT E. LEE was maneuvering to turn down-bound near Mile 97 of the Mississippi River when its starboard stern came into contact with part of the IMTT-Gretna dock facility. The ROBERT E. LEE came into contact with the No. 2 dock barge.

Approximately four months prior to the collision, IMTT-Gretna and BP NAP entered into an Agreement of General Conditions dated October 19, 1990, which was in effect on the date of the collision. (R: 177)[1] Pursuant to this Agreement of General Conditions, BP NAP was afforded the use of storage tanks for bulk liquids, provided the use of a dedicated pipeline to transfer bulk liquids and was provided preferential, though not exclusive, barge access to one of the dock barges comprising the IMTT-Gretna dock facility. (R: 164-165)

The fact that IMTT-Gretna retained all indicia of ownership of the storage facility pipeline and dock

[1] All citations refer to Volume One of the Record and are taken from the deposition of Loy Dean Purcell, the 30(b)(6) representative of BP NAP.

barges is confirmed by the Agreement of General Conditions. Paragraph 1 of the Agreement of General Conditions provides in pertinent part:

> [IMTT] hereby leases and lets unto [BP NAP] and [BP NAP] hereby rents and hires from [IMTT] for the purpose of storage only during the term of this Agreement, the storage tank(s) listed in the attached schedule(s) **provided that [IMTT] shall retain exclusive control and administration of said tank(s) including all throughput in or out thereof, and all premises, lines and appurtenances appertaining thereto**. . . . (emphasis added)

Paragraph 3 of the Agreement of General Conditions further states in relevant part:

> . . . [IMTT] reserves the right to refuse to accept or store or continue to store the materials or any part thereof, if in its opinion the condition of the materials gives reasonable ground for apprehension of loss or damage to other goods or to storage facilities or to any person or persons whatsoever . . .

Paragraph 13 of the Agreement of General Conditions also provides in pertinent part:

> [IMTT] reserves the right to reject any vessel, barge, tanker, rail tank car or tank truck, or any material contained therein, which it reasonably determines to be unsuitable for handling or in bad order, without liability whatever on the part of [IMTT] to [BP NAP] for any loss, damage, demurrage or expense, consequential or remote, sustained by [BP NAP] as a result of such rejection.

It is undisputed that BP NAP did not sustain a loss of any of its bulk liquid products that were stored at the IMTT-Gretna dock facility. (R: 173-174). Further, BP NAP did not have any equipment on the premises of the IMTT-Gretna dock facility and accordingly sustained no physical damage to any of its equipment as a result of the collision. (R: 173,176) BP NAP did not arrange for any surveys of the damaged IMTT-Gretna dock facility and did not effect any repairs to the facility caused by the collision. (R: 177) Moreover, BP NAP had no obligation to insure, nor did it insure, the IMTT-Gretna dock facility for the damage sustained by the dock as a result of the collision. (R: 181)

BP NAP had no employees or representatives at the IMTT dock facility on January 24, 1991, and as a general rule, did not have any employees or representatives present on a daily basis. (R: 159,174) BP NAP had no right to prevent IMTT-Gretna from servicing a competitor of BP NAP at the IMTT-Gretna facility (R: 190) nor did BP NAP have the right to fire an IMTT-Gretna employee working at IMTT's facility whom BP NAP believed to be working in an unsafe manner. (R: 190) Finally, BP NAP had no right to require IMTT-Gretna to change the make up of its dock facility consisting of dock barges, pipelines and fixed structures. (R: 190)

Reduced to its lowest common denominator, the undisputed facts establish that IMTT-Gretna owned, operated, manned and maintained the facility in question consisting of shore side storage tanks and pipelines connecting the storage tanks to a dock in the Mississippi River. BP NAP merely contracted with IMTT-Gretna on an annual basis for the use of certain storage tanks and

was afforded use of a dedicated pipeline and use of a preferential berth at the dock which was available to and used by other IMTT customers.

The IMTT dock sustained physical damages which were repaired by IMTT and for which IMTT brought suit against the S/S ROBERT E. LEE, *in rem* and against Waterman and International *in personam*. The damage claim of IMTT was settled by Waterman. BP NAP filed a separate suit against the S/S ROBERT E. LEE, *in rem* and against Waterman and International *in personam* to recover damages for economic losses associated with interference of its contractual rights that resulted from the collision between the S/S ROBERT E. LEE and the IMTT-Gretna dock facility. BP NAP claimed lost profits allegedly resulting from its diminished ability to receive and deliver bulk liquids from the IMTT-Gretna facility pursuant to the Agreement of General Conditions entered into between IMTT-Gretna and BP NAP.

On September 8, 1992, Respondents filed motions for summary judgment based on the rule of law set forth in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), and followed in *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271 (1986). Respondents based their motions for summary judgment on the allegations of BP NAP's Complaint, the contractual Agreement of General Conditions between BP NAP and IMTT-Gretna, and the course of conduct between BP NAP and IMTT-Gretna as set forth in the 30(b)(6) deposition of BP NAP's representative, Loy Purcell.

On September 28, 1992, the district court issued a Minute Entry with written reasons wherein it granted Respondents' Motion for Summary Judgment dismissing the claim of BP NAP. On October 7, 1992, the Court entered a separate judgment in favor of Respondents and against BP NAP. BP NAP appealed the District Court's decision and the Fifth Circuit affirmed. BP NAP thereafter petitioned the Fifth Circuit for a rehearing but that Petition was denied. In a desperate attempt to relitigate its claim in state court, BP NAP filed a Partial Motion to Dismiss Without Prejudice its state law claim in the Fifth Circuit; however, Petitioners' Motion was denied by the Court on August 16, 1993.

SUMMARY OF ARGUMENT

In 1986 this Court denied a petition of certiorari in *TESTBANK*, where the very same issues were raised and the very same arguments were advanced. The weakness of BP NAP's argument is directly proportionate to the length of its argument.

The rule of law under *Robins* and *TESTBANK* is both well settled and clearly defined: negligently inflicted injuries to purely economic interests – in the absence of physical damages to a proprietary interest – are not compensable as a matter of law. As the Fifth Circuit has explained: "the law has traditionally been reluctant to recognize claims based solely on harm to the interest in contractual relations or business expectancy. The critical factor is the character of the interest harmed and not the number of parties involved." *Dick Meyers Towing Service,*

Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978), cert. den., 440 U.S. 908, 99 S.Ct. 1215 (1979).

The District Court correctly dismissed BP NAP's Complaint for Damages on the basis that it lacked an indispensable prerequisite for recovery – a "proprietary interest" in the damaged property. The record is replete with uncontroverted testimony which supports this finding. BP NAP's 30(b)(6) representative, Loy Dean Purcell clearly established that it was IMTT-Gretna – through the express provisions of the Agreement of General Conditions as well as the day-to-day operation of the dock facility – who exercised real rights of ownership over the dock facility.

Paragraph 1 of the Agreement of General Conditions expressly negated BP NAP's claim that it rather than IMTT-Gretna, exercised control and possession over the damaged property:

> [IMTT] shall retain exclusive control and administration of said tank(s) including all throughput, in or out thereof, and all premises, lines and appurtenances appertaining hereto.

BP NAP representative, Loy Purcell testified that:

(a) The dock facility was owned exclusively by IMTT-Gretna;

(b) The dock facility was operated exclusively by IMTT-Gretna;

(c) The dock facility was maintained exclusively by IMTT-Gretna;

(d) BP NAP had no employees or representatives at the IMTT-Gretna dock on the date of the collision and as

a general rule, did not have any employees present on a daily basis. BP NAP's contract with IMTT-Gretna simply afforded it use of certain storage tanks, a dedicated pipeline and a preferential berth which was available to and used by other customers. Thus, the course of conduct between the parties at the IMTT-Gretna facility combined with the express provisions of the Agreement of General Conditions foreclose BP NAP's assertion of "proprietary interest."

BP NAP's argument for the application of state law, to say the least, is not well founded. First, BP NAP made a Rule 9(h) designation in its Complaint: "Numerous and important consequences flow from whether a district court treats a case as falling under admiralty or diversity jurisdiction." *T.N.T. Marine Service v. Weaver Shipyard & Dry Docks, Inc.*, 702 F.2d 585, 586 (5th Cir.), cert. den. 464 U.S. 847, 104 S.Ct. 151 (1983). In short, BP NAP's claim is treated as one in admiralty by the Rule 9(h) identifying statement. Respondents submit and the Fifth Circuit agreed that the application of state law theories that are wholly inconsistent with *Robins* and the general maritime law would only serve to undermine principles of maritime uniformity which have developed over several decades as well as eradicate "the brightline" that *Robins* offers "in an otherwise murky area," and for those reasons rejected its application. *Mathiesen v. M/V OBLIX*, 817 F.2d 345, 346 (5th Cir.), cert. den. 484 U.S. 898, 108 S.Ct. 234 (1987). After all, this claim arises out of a collision between a vessel and dock on a navigable waterway of the United States.

BP NAP's attempt to ressurect its state law claim in a subsequent state proceeding, was properly rejected by the

Fifth Circuit. The Fifth Circuit had uncontested subject matter jurisdiction over Petitioner's entire claim as a consequence of the general maritime law. 28 U.S.C. 1333. Since the Court's maritime jurisdiction was not "immaterial" it had jurisdiction to adjudicate the entire dispute.

In sum, BP NAP's claim for recovery of economic loss is both factually and legally without merit and the Fifth Circuit's judgment should be affirmed.

ARGUMENT

I. The Court of Appeals Decision is Consistent With This Court's Pronouncement in *Robins Drydock* And Its Progeny.

The present claim involves a collision between a vessel and a dock facility on the Mississippi River, a navigable waterway of the United States; and accordingly, BP NAP's claim and alleged damages are within the admiralty and maritime jurisdiction of the federal courts. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 504, 34 L.Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982); *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed. 2d, 292 (1990). The existence of federal admiralty jurisdiction results in the application of federal admiralty law to the exclusion of state law. *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961); *Freeport Sulphur Co. v. S/S HERMOSA*, 526 F.2d 300 (5th Cir. 1976). As the Fifth Circuit noted in *TESTBANK*:

> . . . the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here . . . To permit recovery here on state law grounds would undermine the principles we seek to preserve today. Accordingly, we decline to adopt plaintiff's state law claims as theories of recovery.

752 F.2d at 1032.

This Court's denial of certiorari in *TESTBANK* in 1986 confirms that this well-settled principle of law is beyond question.

As the following authorities clearly demonstrate, maritime law precludes BP NAP from recovering damages for negligently inflicted economic losses when effective ownership of the damaged property is vested in another, i.e. IMTT-Gretna. *Robins Drydock & Repair Co., supra; M/V TESTBANK, supra; Louisville & Nashville Railroad v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979); *Vicksburg Towing Co. v. Mississippi Marine Transportation Co.*, 609 F.2d 176 (5th Cir. 1980); *Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978), cert. den. 440 U.S. 908, 99 S.Ct. 1215 (1979); *Mathiesen v. M/V OBELIX*, 817 F.2d 345 (5th Cir.), cert. den. 484 U.S. 898, 108 S.Ct. 234 (1987); *Naviera Maersk Espana v. Cho-Me Towing, Inc.*, 782 F.Supp. 317 (E.D. LA 1992).

The seminal case to address the issue of recovery of economic loss resulting from an unintentional tort in a maritime cause of action is *Robins Drydock & Repair Co., supra*. In *Robins*, the plaintiff-time charterers of a vessel sued the defendant dry dock company for lost profits allegedly occasioned by the defendant's negligence in

repairing the damaged ship's propeller. At the time of the damage, the vessel was laid up for regular repairs; the damage to the propeller required the ship to remain in dry dock an extra two weeks. The time charterers sought to recover for loss of use of the vessel during this two week period.

The United States Supreme Court held that the time charterers had no claim for lost profits against the dry dock:

> Plaintiffs' loss arose only through their contract with the owners – and while intentionally to bring about a breach of contract may give rise to a cause of action . . . no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.

75 U.S. at 308-09, 48 S.Ct. at 135-136.

The United States Supreme Court noted that the plaintiff-time charterers had no property interest in the vessel and that the time charterers did not even have "possession" of the vessel at the time of the tort. Thus, the rule enunciated in *Robins* which has been consistently followed in subsequent cases is that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime torts." *TESTBANK*, 752 F.2d at 1020. As the Fifth Circuit has noted, "Although eloquently criticized for its rigidity, the [*Robins*] rule has persisted because it offers a brightline

application in an otherwise murky area." *Mathiesen*, 817 F.2d at 346.

The determinative issue in this case, correctly decided by the Court of Appeals, is whether BP NAP had a sufficient "proprietary interest" in the IMTT-Gretna dock facility at the time of the collision. In making such a determination, the Fifth Circuit has emphasized that "the critical factor is the character of the interest harmed." *Dick Meyers Towing*, 577 F.2d at 1025. Proprietary interest has been defined "to mean that a party must have control over the property tantamount to full ownership." *Naviera*, 782 F.Supp. at 320. In *TESTBANK*, this Court explained:

> We asserted that the distinction between recovery by an *owner* when its property was damaged and *recovery by others* as applied in *Robins, Dick Meyers [Towing Service, Inc. v. U.S.*, 577 F.2d 1023 (5th Cir. 1978)] and M/V BAYOU LACOMBE was 'meaningful, real and dispositive.' (citations omitted) (emphasis added). *Id.* at 1024.

The Court of Appeals determined that BP NAP lacked sufficient proprietary interest in the IMTT-Gretna dock to assert a claim for damages. BP NAP exercised none of the rights associated with effective ownership of property. It neither owned, operated, maintained, insured nor controlled the IMTT-Gretna dock facility in any manner. By contract, as well as by its conduct at the IMTT-Gretna dock facility, IMTT-Gretna retained "exclusive control and administration" of the dock facility.

Recent Fifth Circuit decisions illustrate the point that a "right of use" – without more – does not suffice to show "proprietary interest." In *Louisville & Nashville Railroad v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979), the

plaintiff-railroad brought an action for damages pursuant to the Admiralty Extension Act, 46 U.S.C. § 740 (1975). The district court found that the railroad could not recover for loss of use of a bridge which the defendant-vessel had damaged. The railroad argued that it had a long-standing contractual right to use the bridge and that this right constituted an "easement." It further argued that since an easement was a "property interest," *Robins Drydock* did not bar its claim.

In rejecting the plaintiff's argument, the Fifth Circuit held that even if plaintiff's right to use the bridge constituted an "easement," that interest was insufficient and would not give rise to a right of recovery. The critical point was that plaintiff's interest did not include possession or control of the bridge:

> It is clear that the plaintiffs' right to use the bridge has none of the incidents of ownership . . . that would justify recovery for damage to physical property . . . Louisville & Nashville never had possession or control of Southern's property . . . The bridge is maintained entirely by Southern's employees; Louisville & Nashville had no obligation to repair the bridge or contribute to the cost of repairs in the event of damage by a third party; indeed, we note that Oil Transportation has already paid Southern for the physical damage to the bridge. *Thus, whatever label may be attached to the plaintiff's right to use the bridge, at bottom, the damage to the bridge caused Louisville and Nashville to suffer the loss of an economic expectancy and not a proprietary loss. Robins* and the cases in this circuit following *Robins*, compel us to deny recovery for that loss. (emphasis added)

597 F.2d at 474.

Likewise, under the facts of the instant case, BP NAP's right of use does not include incidents of effective ownership which would justify a recovery here. BP NAP did not own, man, operate or maintain the IMTT-Gretna facility in any manner. Moreover, the physical damages to the IMTT-Gretna facility, after being surveyed by IMTT-Gretna, were repaired by IMTT-Gretna. The defendants also paid IMTT-Gretna, not BP NAP, for the cost of repairs to the facility.

In *Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980), plaintiff was the **owner** of a barge unloading facility and had leased that facility to another party. The lease provided that responsibility for repairs remained with the lessee with an abatement of rent during repairs. Defendant's vessel negligently damaged the facility. Defendant contended that the *Robins* doctrine prevented the lessor-owner's recovery of lost rent because it had contracted away its right to such rent and therefore it did not have a sufficient protected property interest.

The Fifth Circuit rejected defendant's argument and did not deny recovery on the basis of *Robins* because "the plaintiff here is the owner of the damaged property. It has an insurable interest. . . . It has all of the elements of ownership which attach to a freehold interest . . . " *Id.* at 177. The Court went on to note that in *Robins* and *BAYOU LACOMBE*, the plaintiff's interest in the damaged property was less than full ownership. The Court noted that the difference between full ownership and something less for purposes of *Robins* "is meaningful, real and dispositive." *Id.* See also, *Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY*, 614 F.Supp. 890 (E.D. PA 1985)

(joint user of property cannot recover damages when effective ownership of property is vested in another.)

BP NAP mistates the holding of the Fifth Circuit in contending that it erroneously interpreted "proprietary interest" to mean actual ownership; a cursory review of the Fifth Circuit's opinion proves otherwise:

> [BP NAP], fully appreciating the road blocks set by *Robins* and *TESTBANK* argues at length that it has a proprietary interest in the dock. BP NAP argues that only their products were allowed in the pipelines they leased and that they had preferential docking rights at the damaged berth. The Fifth Circuit states that the requirements for proprietary interest are actual possession or control, responsibility for repair and responsibility for maintenance. (citations omitted) BP NAP fails to meet any of the criteria. It certainly did not own any of the property and IMTT-Gretna maintained the right to refuse BP NAP access to the leased pipelines if it felt that the liquids being pumped could be harmful to others or to the pipeline. The appellant's use of the dock and pipelines was valid only for the term of the lease. BP NAP did not have control of the property. It did not repair or had the responsibility to repair the damage. It did not station any employees at the dock so it clearly did not maintain the facility. The district court correctly found that no issue of proprietary interest existed that could have prevented the granting of summary judgment against BP NAP.

993 F.2d at 1194.

Accordingly, the Fifth Circuit rejected BP NAP's claim because it lacked sufficient indicia of ownership in

the IMTT-Gretna dock, not because it lacked actual title to the property.

a. BP NAP Feebly Attempts to Create a Circuit Conflict Where None Exists.

Short work can be made of BP NAP's claim that the brightline rule of *Robins* is in conflict among the Federal circuits. The rule of *Robins* was recently upheld by this Court's denial of certiorari in *Louisiana ex rel Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. den. 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986).

BP NAP cites four decisions from other Federal circuits in support of its contention that "a serious conflict" exists between the Fifth Circuit and other circuits with respect to interpretation of *Robins*. The four cases cited by BP NAP are wholly consistent with the principle enunciated in *Robins* and are distinguishable both legally as well as factually from the present case. As a matter of fact, the Fourth Circuit Court of Appeals in *Venore Transportation Co. v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), emphasized its adherence to the rule of *Robins*:

> In *Robins Drydock*, Mr. Justice Holmes wrote broadly, as he customarily did, but there is no inconsistency in our holding and that of the Supreme Court in *Robins Drydock*. Nor do we enlarge in any way the types of damages which have been traditionally recoverable nor the offending vessel's obligation of recompense.

Id. at 711.

Thus, in *Venore*, the Fourth Circuit allowed the plaintiff to recover damages for loss of use of the vessel while

denying the time charterer recovery of "lost profits." Moreover, *In Re: Bethlehem Steel Corp. v. Marriott Corp.*, 631 F.2d 441 (6th Cir. 1980), the Sixth Circuit interpreted the rights of the parties under the Canada Shipping Act and applied Canadian substantive law regarding the party's right to recover damages. Accordingly, the decision is not in conflict with United States general maritime law.

BP NAP cannot assert a good faith argument that *Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968), is in conflict with the rule of *Robins*. The *Kinsman* decision is clearly consistent with and cites *Robins* as authority for its holding:

> "The law does not spread its protection so far." Holmes, J., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135.

Kinsman, 388 F.2d at 825.

Finally, *Benefiel v. Exxon Corp.*, 959 F.2d 805 (9th Cir. 1992), is clearly distinguishable from the present case. In *Benefiel*, plaintiffs sought recovery for damages under the Trans-Alaska Pipeline Authorization Act. In denying plaintiff's recovery, the Ninth Circuit expressly noted:

> We do not need to reach the specific issue of *Robins Dry Dock* abrogation, for we are confident that Congress in enacting TAPAA did not intend to abrogate all principles of proximate cause.

959 F.2d at 807.

II. Federal Admiralty Law Controls Disposition of Case to the Exclusion of State Law Remedies.

It is well settled that the invocation of federal admiralty jurisdiction results in the application of federal admiralty law rather than state law. *TESTBANK, supra; Kossick, supra; Freeport Sulphur Co., supra.* In its Complaint, BP NAP invoked Rule 9(h) as its jurisdictional statement and is now foreclosed from asserting state law under any other jurisdictional basis. *T.N.T. Marine Service v. Weaver Shipyard*, 702 F.2d 585 (5th Cir. 1983). The Fifth Circuit in *T.N.T. Marine Service* explained:

> The availability of certain maritime remedies . . . depends on the source of jurisdiction as well. . . . Other aspects of substantive law would vary as well, since state law applies to diversity suits under the *Erie* doctrine, while federal common law governs admiralty suits.
>
> * * *
>
> The plaintiff may elect to have a suit treated as either a diversity or admiralty suit, ***each option having advantages and disadvantages, but the plaintiff's case will be treated as one in admiralty 'by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.'***

T.N.T. Marine Service, 702 F.2d at 587. It is clear that BP NAP made a 9(h) designation and did not withdraw or amend its designation prior to judgment against it. Accordingly, BP NAP cannot now claim the benefit of state law remedies.

Recognizing that it has no claim for economic loss without physical damage to a proprietary interest under the general maritime law and in an effort to circumvent the well-established rule of *Robins*, BP NAP also alleged in its Complaint that it was entitled to recover damages for economic loss pursuant to Louisiana law. In particular, BP NAP alleged entitlement to damages under Article 2703 of the Louisiana Civil Code; however, BP NAP's reliance on Louisiana state law is misplaced.

The Fifth Circuit in *TESTBANK* emphasized:

> . . . the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here . . . to permit recovery here on state law grounds would undermine the principles we seek to preserve here today. Accordingly, we decline to adopt plaintiff's state law claims as theories of recovery.

752 F.2d at 1032.

In rejecting BP NAP's state law argument, the Court of Appeals succinctly noted:

> Maritime law specifically denies recovery to non-proprietors for economic damages. To allow state law to supply a remedy when one is denied in admiralty which serve only to circumvent the maritime law's jurisdiction.

993 F.2d at 1195.

a. The Admiralty Extension Act Does Not Save the Day for BP NAP.

It is well settled that the Admiralty Extension Act, 46 U.S.C. § 740 (1975) does not create new causes of action, but rather expands the locality rule of admiralty jurisdiction to encompass "ship-to-shore" torts. *M/V BAYOU LACOMBE*, 597 F.2d at 472. The legislative history behind the Act shows that it was designed to eliminate anomalous and unfair results that could and did flow from adjudicating collision cases according to different and conflicting legal principles. See *Sen. Rep. No. 1593, 80th Congress, 2nd Section*, reprinted in 1948 U.S. Code Con. Serv. 1898; 7(A) *Moore's Federal Practice and Procedure* at 3580-3581 (1983). As one court has noted "it is clear that it was the central purpose of the Admiralty Extension Act to bring all claims in such situations under the uniform application of the general maritime law." *Palumbo v. Boston Towboat Co., Inc.*, 487 N.E. 2d 546, 548 (Mass. App. Ct. 1986). The Federal courts have consistently applied the general maritime law to the exclusion of state law in cases brought under the Admiralty Extension Act. *M/V BAYOU LACOMBE, supra; Palumbo, supra.*

Respondents respectfully submit that BP NAP misreads *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed. 2d 280 (1973). In *Askew*, the plaintiff argued for the application of Florida legislation imposing strict liability for both clean up costs and damages in cases of oil spills in territorial waters. While the Court in *Askew* rested its decision primarily on "the police power of the States over oil spillage," the case also involved application of the Federal Water Quality

Improvement Act of 1970, 33 U.S.C. § 1161(o) (1970), which made explicit that Federal policy was to permit States to legislate with respect to oil spills in their territorial waters. 93 S.Ct. at 1593. The present case, however, deals with principles governing liability for collisions between vessels and land based structures, not responsibility for oil spill response costs; accordingly, the need for uniformity of general maritime law demands its application to the exclusion of state law.

III. Court of Appeals Had Jurisdiction Under 28 U.S.C. 1333 to Adjudicate Entire Controversy Including State Law Claim.

Contrary to the assertions of BP NAP, its alternative federal and state law claims are merely different "counts," "grounds," or "theories" of recovery in support of what is essentially a single claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); see also, *Practice Commentary* by David D. Siegel, 28 U.S.C.A. § 1367 at p. 240 (1993) (cumulative pocket parts). Whether diversity jurisdiction exists is of no moment because the trial court's determination that state law did not supply an alternative remedy to BP NAP is inherent in the Court's exercise of maritime jurisdiction over this traditional maritime collision case. 28 U.S.C. § 1333. BP NAP cannot seriously argue that neither the District Court nor the Fifth Circuit was vested with subject matter jurisdiction over any and all claims arising from the "common nucleus of operative facts" of the ROBERT E. LEE's collision with the IMTT-Gretna dock facility. *Carnegie v. Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct.

614, 98 L.Ed. 2d 720 (1988); *United Mine Workers v. Gibbs, supra.*

It is now statutorily recognized that Federal courts may exercise supplemental jurisdiction over a case where Federal jurisdiction otherwise exists. See 28 U.S.C. § 1367 (doctrines of ancillary and pendent jurisdiction combined into supplemental jurisdiction). In *Gibbs*, this Court stated:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the laws of the United States and treaties made, or which shall be made under their authority . . . " U.S. Constitution, Article III, Section 2.
>
> And the relationship between that claim and the State claim permits the conclusion that the entire action before the Court comprises but one consitutional "case." The Federal claim must have substance sufficient to confer subject matter jurisdiction on the Court . . . the State and Federal claims must derive from a common nucleus of operative fact. But, considered without regard to their Federal or State character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the Federal issues, there is power in Federal courts to hear the hold.

Id. at 725.

The *Gibbs* opinion clearly mandates that claims deriving "from a common nucleus of operative fact" be tried in a single proceeding. Here, BP NAP initiated an action pursuant to the Federal Courts admiralty jurisdiction and

asserted a cause of action based on state law. Accordingly, the District Court clearly had jurisdiction to entertain all theories of recoveries advanced by BP NAP.

CONCLUSION

There is no conflict among the Circuits and there is absolutely nothing whatsoever in the instant Petition which requires this Court's attention. The Fifth Circuit's decision is in complete harmony with this Court's decision in *Robins* and its progeny, *M/V TESTBANK*. Where a petition for certiorari was likewise denied. BP NAP's Petition is devoid of merit and should also be denied.

DATED this 15 day of December, 1993.

Respectfully submitted,

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